

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

EUGENE A. GAITERS, as Trustee
and Beneficiary; et al.,

v.

THE CITY OF CATOOSA, a municipality
of Rogers County, Oklahoma, et al.

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Case No. 03-CV-425-CVE-SAJ

REPORT AND RECOMMENDATION

Currently before the Court is a pleading submitted by Eugene A. Gaiters on July 17, 2006. [Docket No. 78-1]. The pleading is an effort by Mr. Gaiters to comply with the June 21, 2006 Order of the Chief Judge of the Northern District of Oklahoma ("the Order") that outlines the requirements imposed upon Mr. Gaiters for any *pro se* submissions or pleadings which Mr. Gaiters wants to file in this action.

In the July 17, 2006 submission, Mr. Gaiters attempts to file an application to file a motion to vacate the dismissal of Ark Wrecking Co. The Court has evaluated and considered the proposed pleading, and the United States Magistrate Judge recommends that the District Court not approve the pleading for filing. [Docket No. 78-1].

I. BACKGROUND AND PROCEDURAL FACTS

The July 21, 2006 Order requires that before filing any pleadings in this action, Mr. Gaiters must first file a motion seeking permission to file the pleading. The motion must include a statement, under penalty of perjury pursuant to 28 U.S.C. § 1947, including: (a) the legal basis for the pleading; (b) the specific factual basis for the pleading; (c) a statement that the issues raised in the proposed pleading have never been finally disposed

of by any federal or state court; (d) the identity and nature of assistance by any third person; and (e) a statement that the factual allegations and/or legal arguments raised by the proposed pleading comply with Fed. R. Civ. Proc. 11. See [Docket No. 76-1, at 1].

In compliance with the July 21, 2006 Order, the undersigned has been directed to enter a Report and Recommendation addressing whether or not the proposed pleading meets the requirements imposed by the Order.

II. REVIEW OF THE PROPOSED JULY 17, 2006 PLEADING

The Court has reviewed Mr. Gaiter's proposed pleading. Mr. Gaiter makes no attempt to address the required sub-points (a) legal basis for pleading, (b) specific factual basis for pleading, and (d) identity and nature of any assistance by a third person. Mr. Gaiter has indicated that the issues raised have never been presented to another Court, and has stated that the arguments comply with Fed. R. Civ. Proc. 11. However, because of the noted deficiencies in the pleading and the failure to comply with the Court's July 21, 2006 Order, the United States Magistrate Judge recommends that the District Court deny the application to file a motion to vacate the dismissal of Ark Wrecking Co.

III. RECOMMENDATION

Because the Proposed Pleading did not adequately address the requirements imposed by the District Court in the July 16, 2006 Order of the Chief Judge, the United States Magistrate Judge recommends that the petition not be approved for filing.

OBJECTIONS

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), a party may file specific written objections to this Report and Recommendation. Objections must be filed

with the Clerk of the District Court for the Northern District of Oklahoma within 10 days of being served with a copy of this Report and Recommendation. See Fed. R. Civ. P. 6 (as to computation of time periods). If specific written objections are timely filed, the district judge assigned to this case will

make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b). See *also* 28 U.S.C. § 636(b)(1).

The Court of Appeals for the Tenth Circuit has adopted a “firm waiver rule” in connection with appeals from orders adopting a Magistrate Judge’s report and recommendation. “[T]he failure to make timely objections to the magistrate’s findings or recommendations waives appellate review of factual and legal questions.” *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)). **Thus, a timely, specific and written objection is necessary to preserve an issue for *de novo* review by the assigned district judge and for appellate review by the court of appeals.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Haney v. Addison*, 175 F.3d 1217 (10th Cir. 1999); and *Talley v. Hesse*, 91 F.3d 1411 (10th Cir. 1996).

Dated this 18th day of July 2006.


Sam A. Joyner
United States Magistrate Judge